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September 30, 2010

Corbin R. Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2010-16
Proposed Amendments of MCR 6.302 and 6.610

Dear Mr. Davis and Justices of the Court:

I respectfully submit these comments to the Court for your consideration in amending certain court rules (MCR 6.302 and 6.610) that govern the taking of pleas in state circuit and district court criminal matters since the U.S. Supreme Court decision in *Padilla v Kentucky*.[1]

I practice immigration law and have a serious and passionate commitment to this area of law and to the clientele I serve. I wish to make sure the Court considers all issues before amending these rules. The slightly broader amendment in Alternative B is preferable to Alternative A.

There are three points I'd like to make. (1) In most cases, a state court judge should not specifically inquire as to the precise immigration status of a criminal defendant. (2) No court rule should require a criminal defense attorney to divulge the immigration status of their client, unless that client waives attorney-client privilege. (3) MCR 3.971(B) and 3.941(C) also relate to the taking of pleas in quasi-criminal matters in juvenile court and could be considered for amendment by this Court.

[1] __ US __; 130 S Ct 1473; 176 L Ed 2d 284 (2010)

IN MOST CASES, A STATE JUDGE SHOULD NOT INQUIRE AS TO THE SPECIFIC IMMIGRATION STATUS OF A CRIMINAL DEFENDANT.

Although there are constitutionally-permissible distinctions between US citizens and lawful permanent residents, state action that focuses on such distinctions are ripe for review. The U.S. Supreme Court in *Padilla v Kentucky* focused on a criminal defense attorney's duty to ensure that his client makes a knowing and voluntary plea. Of course, judges and prosecutors also seek to ensure justice in the taking of pleas; however, this can be accomplished without inquiring specifically into the defendant's immigration status. Alternative B achieves this more readily than Alternative A because Alternative B does not require a specific response by the defendant regarding his immigration status.

Many "noncitizens"[2] are lawful permanent residents. Padilla was of this category. Many persons who may appear as defendants in state circuit or district court might also be lawfully present as nonimmigrant temporary workers, visitors, students, investors, athletes or entertainers, refugees/asylees, witnesses, victims of traffickers or other crimes. Other persons who may appear as criminal defendants might be here unlawfully, overstaying their temporary visas or entering without inspection or under fraudulent circumstances.

Most laws ensure that lawful permanent residents are afforded the same rights and liberties as citizens.[3] While the federal government can draw distinctions among aliens in immigration matters[4], state action that draws a distinction between U.S. citizens and lawful permanent residents may be subject to stricter scrutiny.[5] If this Court is able to achieve its intended purposes in the least restrictive manner, it should do so. As opined in *Padilla*, this Court's purposes for amending the rules on plea-taking could be many – ensuring that the court accepts a knowing and voluntary plea, ensuring that a criminal defendant is not subject to ineffective assistance of counsel, and court efficiency. Alternative B offers the same opportunity to achieve these results as Alternative A, without requiring any actual U.S. citizen-lawful permanent resident distinction in court by the defendant. *Padilla* set forth a constitutional minimum for effective assistance of counsel. Alternative B meets this minimum without muddying the issue with other state action that might impact a suspect class.

Padilla highlighted a criminal defense attorney's duty to distinguish between citizenship and lawful permanent residency in effectively advising his client as to the immigration consequences of criminal convictions. The federal government needs only rational basis to make such distinctions. But a state actor, be it a state court judge or prosecutor, may be held to stricter scrutiny. It seems wiser to take the least restrictive option offered by this Court's proposed Alternative B.

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[2] Although use of the word "noncitizen" is understandable after a reading of *Padilla*, "not a U.S. citizen" would more clearly alert a criminal defendant. We are all citizens of some country and "noncitizen" could confuse a layman.

[3] *Yick Wo v Hopkins*, 118 US 356, 359 (1886) and its' progeny.

[4] *Castro v Holder*, 593 F3d 638, 640-41 (7th Cir, 2010).

[5] *Nyquist v Manclet*, 432 US 1 (1977).

THE COURT RULE SHOULD NEVER REQUIRE A CRIMINAL DEFENSE ATTORNEY TO DIVULGE HIS CLIENT'S IMMIGRATION STATUS, UNLESS THAT CLIENT WAIVES ATTORNEY-CLIENT PRIVILEGE.

I strongly disagree with suggestions in Assistant Prosecutor Baughman's letter to this body, dated September 15, 2010. He asserts that a criminal defense attorney must know whether or not the defendant is not a U.S. citizen in the course of his representation and "disclosure of this fact [to the state court] does not seem . . . untoward." It is untoward for a state judge to inquire into matters that are covered by the attorney-client privilege.

Attorney-client privileges are still at play and nowhere does *Padilla* require otherwise. The criminal defendant, upon advice of his counsel, is the only party able to decide whether or not it is necessary or advantageous to disclose his immigration status in the course of plea bargaining or sentencing.

Many criminal defense attorneys, especially since the passage of AEDPA[6] and IIRIRA[7] and the subsequent Supreme Court decision in *INS v St. Cyr*[8], have consulted with immigration attorneys as to the immigration consequences of a particular criminal conviction. These communications should remain privileged unless waived by the defendant. Due process concerns should outweigh the court's or prosecutor's need for court efficiency in a curtly-worded amendment. The assistant prosecutor's proposed amendment should not be adopted.

A PLEA TAKEN IN QUASI-CRIMINAL MATTERS IN JUVENILE COURT MAY ALSO HAVE IMMIGRATION CONSEQUENCES.

Justice Markman is correct that collateral consequences of state court action on an immigrant's status are expansive. There are other ways the court rules could be amended such that a defendant or respondent is fully informed and able to make a knowing and voluntary plea. For example, pleas are often a part of juvenile court proceedings. MCR 3.971(B), used with parents in civil child abuse/neglect proceedings, mirrors the court rules proposed for amendment by this Court; MCR 3.941(C), likewise, for juveniles charged with an offense under the juvenile code.

Of course, *Padilla* could be interpreted as applicable only to immigration consequences of criminal convictions. But the heart of *Padilla* is the Sixth Amendment right of the criminal defendant to effective assistance of counsel. In the juvenile context, parents in neglect cases, and minors in delinquency cases, have the right to counsel and, thereby, effective assistance of counsel. Because admissions made in juvenile

[6] Anti-Terrorism and Effective Death Penalty Act of 1996, PL 104-132, title IV; 110 Stat. 1214, 1258-81 (Apr. 24, 1996)
[7] Illegal Immigration Reform and Responsibility Act of 1996, PL 104-208, div. C; 110 Stat. 3009, 3009-46 to 724 (Sept. 30, 1996)
[8] 533 US 289, 324 (2001)

proceedings could lead to deportation and removal, the same reasoning set forth by the Supreme Court in *Padilla* could apply in the juvenile context.

Although child neglect/abuse proceedings are civil in nature, there may be immigration consequences to an adult who offers a plea to allegations of child abuse or neglect. Immigration authorities can later consider these admissions as acts of moral turpitude even absent a criminal conviction; thereby, subjecting that parent to removal proceedings or denying their application for citizenship.[9] Certain statutory relief from removal requires a showing of "good moral character" which is complicated, of course, by an admission of child abuse or neglect.[10]

A finding of responsibility under the juvenile delinquency statutes is NOT considered a criminal conviction for immigration purposes[11]; however, there may be other immigration consequences for that juvenile.[12] Although the instances are rare, they do exist. A juvenile found responsible for certain crimes may not be able to later adjust his status from nonimmigrant to immigrant or from lawful permanent resident to citizen[13], despite that fact that all his other family members may receive such benefit. Also, his juvenile sentence could later enhance a subsequent adult sentence, adversely affecting his immigration status.

In short, there are less constitutional concerns raised in the proposed Alternative B which make it the preferred amendment. Thank you for you consideration.

Respectfully submitted,

Cynthia M. Nuñez

[9] For inadmissibility grounds relating to admissions of acts which would constitute moral turpitude, see INA Sec. 212(a)(2)(A)(*i*)(I), 8 USC 1182(a)(2)(A)(*i*)(I); For removability grounds based on inadmissibility for moral turpitude, see INA Sec. 237(a)(1)(A), 8 USC 1227(a)(1)(A); For denial of citizenship for admitting facts that constitute a crime involving moral turpitude, see 8 CFR 316.10(b)(2)(iv) and (3)(i) and (iii) and INA Sec 101(f), 8 USC 1101(f) and the catch-all provision therein.

[10] For statutory language requiring good moral character for certain nonpermanent residents who seek cancellation of removal, see INA Sec. 240A(b)(1)(B), 8 USC 1229b(b)(1)(B); For statutory language relating to good moral character requirements, see INA Sec 101(f)(3), 8 USC 1101(f)(3); and "catch-all provision" that provides "[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

[11] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) and 22 CFR 40.21(a)(2).

[12] 18 USC 5031-42 and 8 CFR 236.10.

[13] *Deluca v Ashcroft*, 203 F Supp 2d 1276, 1279 (MC Ala 2002).